80-1164

NO. ———

Supreme Court, U. S.
FILED
DEC 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

PARKER McVICKER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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Question Presented

WHETHER SEC. 42.07 (A) (1), OF THE TEXAS PENAL CODE, WHICH PROVIDES, IN PART, AS FOLLOWS:

> (a) A person commits an offense if he intentionally:
>
> (1) communicates by telephone . . . in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient . . .

IS FACIALLY VAGUE AND GROSSLY OVERLYBROAD AND, THEREFORE, VIOLATIVE OF DUE PROCESS OF

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Opinion Below

There is no opinion of the Court of Criminal Appeals. An Order of the Court was entered, Per Curiam, En Banc, on September 29, 1980, and a copy of same is attached to this Petition as Exhibit "K".

Jurisdiction

As reflected by the Certificate of the Clerk of the Court of Criminal Appeals, the entry of the above Order constitutes a final judgment of the Court of Criminal Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions Involved

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution provides in part:

> SECTION 1. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Statement of the Facts of the Case

Petitioner, an Attorney at Law, was charged by Complaint and Information, filed in the County Court at Law of Angelina County, Texas, on July 3, 1979, in Cause Number 10367, in that cause entitled The State of Texas vs. Parker McVicker, for the alleged criminal offense of "telephone harassment," see Texas Penal Code, Sec. 42.07(a)(1), and, on October 5, 1979, pursuant to a plea of guilty to said charge, Petitioner was assessed a fine of ONE THOUSAND AND NO/100 DOLLARS ($1,000.00), which was subsequently paid by Petitioner.[1]

Petitioner thought this ended and terminated the matter.

However, much to Petitioner's chagrin and surprise, on or about the 20th day of November, A.D. 1979, the Chairman of the Grievance Committee, District 3B, State Bar of Texas, in its Cause Number 79-17, filed a Complaint against Petitioner, which complaint was predicated upon the aforesaid conviction. On June 5, 1980, a hearing on said complaint was conducted by the said Grievance Committee and that Committee made certain unfavorable findings towards Petitioner to which Petitioner objected. Under the provisions of the State Bar Act of Texas, a proposed Order of Suspension was presented to Petitioner, but same was totally and wholly unacceptable to and was rejected by Petitioner as more clearly reflected by Petitioner's objections to the proposal. Thereafter, the State Bar of Texas, acting through its General Counsel, on or about September 25, 1980, filed an Original Formal Complaint against Petitioner and the matter is now pending in the District

[1]See Exhibits "A", "B", and "C" attached hereto.

Court of Angelina County, Texas, in that Cause Number 18244-80-9, and in that cause entitled The State of Texas vs. Parker McVicker.[2]

The history of this Petition for Certiorari reflects that Petitioner, on or about July 31, 1980, filed an original Application for Writ of Habeas Corpus in the County Court at Law of Angelina County, Texas to set aside the aforesaid conviction and, on September 2, 1980, a hearing was held and conducted on said Application with the trial court judge ruling that: "It's the finding of the Court that jurisdiction is not proper in this matter in this Court and that jurisdiction lacks; and therefore the writ is dismissed at this time."[3]

Under Texas law, there is no appeal from such a decision. See, for example, *Phelper v. State*, Tex. Cr. App., 433 SW2d 897 (1968); and *Ex parte Brewer*, Tex. Cr. App., 452 SW2d 452 (1970).

Therefore, the Petitioner then filed an original Application for Writ of Habeas Corpus with the Court of Criminal Appeals of the State of Texas which was, on September 29, 1980, denied by that Court. Petitioner has, however, exhausted all avenues for relief to the Court of Criminal Appeals.[4] The action of the Court of Criminal Appeals is understandable in light of its decision in *Kramer v. State*, No. 57,355, October 1, 1980, on State's Motion for Rehearing, where a majority of the Court, by a 5-4 decision, on the day after it denied Petitioner's Application, rejected in part or whole the contentions Petitioner presents to this Honorable Court.

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[2]See Exhibits "D", "E", "F", and "G" attached hereto.

[3]See Exhibits "H" and "I" attached hereto.

[4]See Exhibits "J", "K" and "L" attached hereto.

Comment

Because Petitioner is presently suffering collateral consequences or collateral disabilities arising from his aforesaid conviction, see supra, the issue regarding the validity of his conviction is not moot, even though the fine assessed and imposed has been paid by Petitioner.

This Honorable Court in *Carafas v. La Valle*, 391 U.S. 234, 20 L.Ed. 554, 88 S.Ct. 1556 (1968) held, in that regard:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens (which) may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." . . . On account of these "collateral consequences," the case is not moot. (558, L.Ed.).

See also *Matthews v. Florida*, 463 F.2d 679 (5th Cir. 1972).

Thus, as easily seen by the Complaint of the Grievance Committee, see Exhibit "D," its action was predicated entirely upon the conviction of Petitioner. See also the proposed Order of Suspension, Exhibit "E." For whatever reason, it now appears that the action of the General Counsel of the State Bar of Texas resembles a "change of horses in midstream," but it is nevertheless submitted that as the evidence of the conviction can go to the allegations in the pleadings, the conviction is, at this time, similar to the real estate principle of law of *Nubibus*, in that the conviction of

Petitioner is hovering in the sky awaiting a place to fall in the lawsuit now pending to reprimand, suspend or disbar Petitioner from the practice of law. Thus, the conviction Petitioner suffered is now being used, either directly or indirectly, by the State Bar of Texas in its action against Petitioner. Unquestionably, Petitioner is presently suffering collateral disabilities or collateral consequences from the conviction.

Summary of the Argument

DISCUSSION, ARGUMENT AND AUTHORITIES

AS APPLIED IN THE INSTANT CASE, *TEX. PENAL CODE ANN. TITLE* 4, §42.07(a)(1) (*VERNON'S* 1974), IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND OVERLY OVERBOARD.

The Petitioner in the case at bar has been convicted of violating *Tex. Penal Code Ann. Title* 4, §42.07(a)(1) (*Vernon* 1974), which provides in pertinent part:

> (a) A person commits an offense if he intentionally:
>
> (1) communicates by telephone or in writing in vulgar, profane, obscene or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly or recklessly annoys or alarms the recipient or intends to annoy or alarm the recipient. (Emphasis underscored.)[5]

It is respectfully submitted that this statute, as applied in the instant case, fails to satisfy stated constitutional standards of due process in that it is vague and overlybroad, and it criminalizes expression which the United States Supreme Court has found to be protected by the First Amendment.

It must be recognized initially that the state has a

[5]The accusation, for which Petitioner was convicted, alleged in pertinent part that the Petitioner "did then and there intentionally communicate by telephone in a coarse and offensive manner and by this action intentionally and knowingly alarmed Lisa Fussell, the recipient of said communication." See also Exhibit "A".

legitimate interest in protecting privacy and in proscribing obscene, threatening, or harassing phone calls. *Cf. Miller v. California,* 413 U.S. 15, 93 Sup.Ct.Rep. 2607, 37 L.Ed. 2d 419 (1973); *Rowan v. Post Office Department,* 397 U.S. 728, 90 Sup.Ct.Rep. 1484, 25 L.Ed. 2d 736 (1970); *Watts v. United States,* 394 U.S. 705, 89 Sup.Ct.Rep. 1399, 22 L.Ed. 2d 664 (1969). Such activity may permissibly be punished since it is not protected by the First Amendment. The proscription, however, must not be one that unduly impinges on protected expression. *See, e.g., Gooding v. Wilson,* 405 U.S. 518, 94 Sup.Ct.Rep. 1780, 40 L.Ed. 2d 250 (1972). Standing to raise the issue of overbreadth in the First Amendment context is conferred because it is deemed necessary; otherwise, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Lewis v. City of New Orleans,* 415 U.S. 130, 133-34, 415 U.S. 130, 94 Sup.Ct.Rep. 970, 39 L.Ed. 2d 214 (1974). *See also, Walker v. Dillard,* 523 F.2d 3 (4th Cir. 1975), *cert. denied,* 423 U.S. 906 (1975).

Although §42.07(a)(1) has not been authoritatively construed, Cf. *Kramer v. State,* No. 57,355, October 1, 1980, on State's Motion for Rehearing, the constitutionality of its predecessor, *Tex. Penal Code Ann.* Art. 476, has been upheld. In *Alobaidi v. State,* 433 SW2d 440 (Tex. Crim. 1968), *cert. denied,* 393 U.S. 943 (1969), the Court of Criminal Appeals upheld the validity of that part of the law which excepted harassing, annoying, or threatening telephone calls if such calls were "for a lawful business purpose." The court did not address the questions of vagueness or overbreadth as the only question decided was whether there could be a statutory exception for business calls. In *LeBlanc*

v. State, 441 SW2d 847 (Tex. Crim. 1969), the defendant's contention that the statute was void because it was too vague and indefinite was summarily overruled by the court on the basis of *Alobaidi v. State, supra.* In his article, "The Texas Harassment Statute," 17 *South Texas Law Journal* 283 (1975),[6] Prof. Paul Olson noted that "[t]he reliance upon *Alobaidi v. State* was misplaced, for, as shown above, any possible constitutional holding in *Alobaidi* as to the portion of the statute in question could only be dicta." *Id.* at 295.

Professor Olson pointed out that the only case construing this statutory provision is *Darnell v. State,* 72 Tex. Crim. 271, 161 SW 971 (1913). In that case the phrase "son of a bitch" was found to be indecent, vulgar, and obscene based on the definition given to the phrase by lexicographers. This holding is suspect for two reasons. First, the definitions of the phrase were as vague as the statutory language itself, and the enforcement of the statute "was placed within the subjective discrimination of the particular trier of fact, one of the very things prohibited by the doctrine of vagueness." Olson, *supra,* 17 *S. Tex. L.J.* at 296. *See Smith v. Goguen,* 415 U.S. 566 (1974). Second, the term "vulgar" has been held to be inherently vague. *Courtemanche v. State,* 507 SW2d 545 (Tex. Crim. 1974).

In *Collection Consultants, Inc. v. State,* 556 SW2d 787 (Tex. Crim. 1977), *appeal dismissed,* 436 U.S. 901 (1978), *rehearing denied,* 438 U.S. 908 (1978), the Court of Criminal Appeals upheld the constitutionality of subdivision (a)(2) of §42.07, which deals with threatening, by telephone or in writing, to take unlawful action against a person and by such action annoying or alarming the recipient. The court

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[6]Hereafter referred to as S. Tex. L.J.

ruled, *inter alia*, that the words "annoy" and "alarm" did not render this section unconstitutionally vague. The decision did not, however, rule on the constitutionality of subsection (a) (1).

The part of the statute under examination concerns words which are "coarse" and "offensive". As noted above, the term "vulgar" has already been held to be vague. *Courtemanche v. State, supra.* The definition of vulgar used in *Darnell v. State, supra* (lacking cultivation or refinement; offensive to good taste or refined feelings; low; coarse), was rejected in *Courtemanche* since it did not clarify how the term was to be applied. The decision states that "under such a definition some segments of the population could well find any form of barroom entertainment to be vulgar." 507 SW2d at 546. Additionally, the words "offensive to public decency" were held to be vague and indefinite in *Irven v. State,* 138 Tex. Crim. 368, 136 SW2d 608 (1940). The court felt that the proscribed acts would vary too much according to the "fastidious, refined, or primitive views of the community in which they happen to be committed . . ." 135 SW2d at 609.

Due process requires that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[7] *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 Sup.Ct. Rep. 2294, 33 L.Ed. 2d 222 (1972). In *United States v. Harriss,* 347 U.S. 612, U.S. 74, Sup.Ct.Rep. 803, 98 L.Ed. 2d 989 (1954), the Supreme Court of the United States declared that the underlying principle in cases involving vague

[7]Interestingly, by the accusation, see Exhibits "A" and "B", the Petitioner was not told what words he uttered that were "coarse" and "offensive."

statutes is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." 347 U.S. at 617. The test to be applied is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. De George,* 341 U.S. 223, 231, 71 Sup.Ct.Rep. 703, 95 L.Ed. 886 (1954). When First Amendment rights and freedoms are involved, however, a stricter standard is to be applied. See *Ashton v. Kentucky,* 384 U.S. 195, 86 Sup.Ct.Rep. 1407, 16 L.Ed. 2d 469 (1966).

In the instant case the statute at issue fails to give sufficient warning as to the proscribed conduct when measured by common understanding. Words such as "vulgar," "profane," "obscene," "indecent," "coarse," and "offensive" do not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. The meaning of these terms "depends upon the moral idiosyncracises of the persons who compose the court or jury." The standard of crime can be ever varying and the courts on appeal may be constantly forced to become instruments of moral reform whenever there is a fluctuation in moral sentiment." Olson, *supra,* 17 *S. Tex. L.J.* at 298.

Of equal concern with the void for vagueness doctrine is the problem of overbreadth. A statute which proscribes activities that are protected under the First and Fourteenth Amendments as well as those activities which are not protected is overbroad and unconstitutional. Overbroad statutes have a "chilling effect" that tends to deter the exercise of protected speech.

Walker v. Dillard, supra, 523 F.2d 3 (4th Cir. 1975), involved a violation of a Virginia statute, *Va. Code Ann.*

§18.1-238 (1950), which proscribed the use of "vulgar, profane, threatening, or indecent language" over the telephone. The Fourth Circuit Court of Appeals found the statute facially overbroad and ruled in favor of the petitioner for habeas corpus. The court was particularly disturbed by the fact that "the statute does not reach the anonymous midnight caller who only breathes into the mouthpiece, unless repeated calls might be said to be abusive, but it makes punishable an indiscreet response from the outraged recipient of that call." 523 F.2d at 5.

The *Walker* court also found that the words "vulgar," "profane," and "indecent" were "capable of overbroad interpretation." *Id.* The court noted in *Gooding v. Wilson, supra,* that "the court held facially unconstitutional a Georgia statute proscribing 'opprobrious words or abusive language' because the statute had not been narrowed by the state courts to apply only to 'fighting words.' " 523 F.2d at 5. In *Cohen v. California,* 403 U.S. 15, 1780, 29 L.Ed 2d 284 (1971), an unquestionably vulgar phrase was found to be protected nonetheless because it amounted neither to obscenity nor fighting words.

The opinion in *Walker* notes that if the words of the statute were construed to prohibit *only* obscenity, they could stand. The court found, however, that the statute did not allow for such construction since the words were not used in conjunction with more specific adjectives which would limit the proscribed conduct to obscene language. Thus, the court concluded that the statute was "facially and substantially overbroad." 523 F.2d at 6.

A North Carolina statute quite similar to the one struck down in *Walker* was found unconstitutionally overbroad in *Radford v. Webb,* 446 F. Supp. 608 (W.D. N.C. 1978), *aff'd,*

596 F.2d 1205 (4th Cir. 1979). In that case a defendant, convicted of violating *N.C. Gen. Stat.* §14-196 (1969), upon a charge that he had used "profane, indecent and threatening language" over a telephone, applied for a writ of habeas corpus, claiming that the statute was overbroad on its face and that it violated the First and Fourteenth Amendments. The District Court, referring to *Walker v. Dillard, supra*, noted that the Court of Appeals for the Fourth Circuit had found the Virginia statute, which prohibited the use of "vulgar, profane, threatening or indecent language over any telephone," to be overbroad. The court then stated:

> There is nothing in this case to distinguish it from *Walker*. The language of N.C.G.S. §14-196(a)(1) is broad enough to cover not only obscenity but also the use of words whose "connotation" is vulgar or profane. Such a sweeping prohibition would reach comments made in the course of heated arguments or expressions of justified indignation just as easily as it could be applied to the traditional obscene phone call. A statute whose terms are thus susceptible of constitutional as well as unconstitutional application can only survive if it has been authoritatively construed to exclude speech which, though vulgar or offensive, is protected by the First and Fourteenth Amendments. 446 F. Supp. at 610-11.

The court rejected the state's argument that the statute had been "sufficiently narrowed" so as to pass constitutional requirements.

The Texas harassment statute, as to the part under examination in the instant case, is similarly overbroad. A facial attack on the statute cannot be withstood if the

statute may be applied to speech that is protected by the First and Fourteenth Amendments even if such speech is coarse or offensive. *Gooding v. Wilson, supra; Lewis v. City of New Orleans, supra.* As the Court of Appeals for the Fifth Circuit stated in *Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), *cert. denied,* 397 U.S. 936 (1970):

> The legislature cannot constitutionally use a "blunder-buss" approach that sweeps in wide areas of protected speech even if its goal is to eradicate an evil undeniably caused by a smaller included area of unprotected expression; it cannot simply decide that "a certain kind of speech [is], itself, harmful and unlawful." 415 F.2d at 671.

Section 42.07(a)(1) may not be as broad as the Virginia statute, but surely the words used in the statute are susceptible of overly broad application due to subjective influence. The words "vulgar," "profane," and "indecent" were found to be capable of overbroad interpretation in *Walker v. Dillard, supra.* One commentator has written that: "[A] person may be convicted under the Texas statute, as it now stands, for using language he may not know to be prohibited and by being negligent in failing to discover beforehand whether the language might 'annoy' or 'alarm' the recipient." Olson, *supra,* 17 *S. Tex. L.J.* at 300.

Professor Walter W. Steele, Jr. has called §42.07 a textbook case of vagueness and overbreadth. He states:

> Section 42.07 requires that the recipient of the communication be annoyed or alarmed. But the only manner in which the recipient's annoyance can be known is by the recipient's statement to that effect. Every person has his own unique scale

> of annoyance, and an accurate determination of that scale is impossible to judge. Furthermore, the Harassment section is so broad that it includes callers who have every right and reason to intentionally and knowingly annoy or alarm the recipient of the call.

See Steele, "The Impact of the New Penal Code on First Amendment Freedoms," 38 *Texas Bar Journal* 245, 253 (1975).[8]

The Texas harassment statute proscribes language which is protected as well as language which is not protected by the First and Fourteenth Amendments. It is not so narrowly drawn to be limited to "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 Sup.Ct. Rep. 89 (1942). Vulgar, indecent, profane, obscene, coarse and offensive language are not, without more, subject to criminal sanction. *Cohen v. California, supra.* In the words of the Supreme Court in *Cohen*, "one man's vulgarity is another's lyric." 403 U.S. at 25. As long as the means are peaceful, "the communication need not meet standards of acceptability." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 Sup.Ct.Rep. 1575, 29 L.Ed. 2d 1 (1971). Section 42.07(a)(1) proscribes coarse and offensive language whether used peacefully or not. It is wholly subjective in that one cannot know what language would annoy or alarm the recipient until the recipient speaks. It seeks to regulate speech that is protected by the First and Fourteenth Amendments and is, therefore, facially overbroad. It is respectfully submitted, therefore, that [42.07(a)(1), as applied in the instant case, fails to meet the standards of

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[8]Hereafter referred to as Tex. B.J.

due process in that it is unconstitutionally vague and overbroad.

If anything, the terms "coarse" and "offensive manner" are far more vague and indefinite than are the terms "vulgar," "profane," "obscene," and "indecent." What was said above regarding the latter terms is truly applicable to the former terms. The terms "coarse" or "offensive manner" actually vary with the different phases of society, depending upon the fastidious, refined, or primitive views of the community or among the particular persons when they are uttered or when the communication takes place. Words that are "coarse and offensive" or words used in an "offensive manner" in one locale or setting may very well be regarded as harmless in another and, indeed, in another even proper.

The Court's attention is directed to Exhibit "H," the Application for Writ of Habeas Corpus, for additional authority as to why the statute, as to that part challenged, is constitutionally deficient.

In its construction of the statute, the Majority of the Court of Criminal Appeals, in *Kramer v. State*, supra, was faced with a factual situation whereby a cast-off lover, the Defendant, sent a postcard, addressed to her former lover, the husband of the Complainant, with the following message affixed to the back of the postcard:

"Baby Problem Solved
—with this beautiful
ALL METAL
CASKET-VAULT COMBINATION
CRYPT-A-CRIB
P. O. Box 11074
Cincinnati, Ohio 45211"

The Majority of the Court first ruled that "a person of ordinary intelligence can readily understand what is proscribed." "There is no room in the statute for a vindictive or overly sensitive recipient to create an offense by his own belief in the coarseness or offensiveness of a message."

The Majority next rejected the contention that the statute was overbroad, quoting from *Cohen v. California, supra,* for authority.

Judge Roberts, joined by Judge Phillips, in his dissenting opinion, said that the word "coarse" refers to "dirty" language, and that the phrase "in a coarse and obviously offensive manner" was intended to replace the terms "vulgar, profane, obscene, or indecent language." He said that even though the message may have been offensive or was actually a spite message, nevertheless, it was not "coarse" or "dirty" and therefore did not fall within the ambit of the statute and for that reason there was no offense. As to the question of vagueness, his Honor said: "If it [the word 'coarse'] can mean 'spiteful,' who knows what else it can mean?" "People of common intelligence must necessarily guess at its meaning, and the job of guessing has been made harder today." In also ruling that the statute is grossly overbroad, His Honor also said that "the court literally has made it an offense to send anyone an annoying or alarming letter." "It should go without saying that the First Amendment protects even annoying and alarming speech."

> The point is that in order to punish this appellant for her bizarre activities the court has broadened the statute into an area of speech that is protected by the First Amendment. After today's decision, for example, anyone who writes a letter to a

> public official in vigorous disagreement with the official's performance in his duties is subject to being jailed. So are the operators of charities who intentionally mail out alarming pictures of starving Asian orphans in order to raise funds. So are anti-abortion propagandists who mail alarming pictures of aborted fetuses. Any of these letters could be deemed "coarse and offensive" under today's decision.

Interestingly, His Honor, in a footnote, said: "Our mail occasionally brings us similar diatribes from some (usually anonymous) members of the public, but I would not have thought before today that they could be jailed for writing their views."

Judge Clinton, in his dissenting opinion, joined by Presiding Judge Onion, also pointed out in a footnote that "some citizens may and do communicate in a coarse and offensive manner intending all the while to annoy or alarm."

> Members of the majority live in splendid isolation not to have pressed upon them the strident tract of political dissent, religious zealotry, charitable plea, insistent solicitation, and assorted exhortations and damnations — all in home or at the front door. Annoying and aggravating though they be, the law need not still such expressions. In all good spirit I suggest the majority should recognize and acknowledge them by saying that in extending the former proscription of harassment by telephone, the legislature reached out and touched someone whose written expressions are constitutionally protected.

Conclusion

That part of Art. 42.07(a)(1), V.A.T.P.C., prohibiting communication by telephone in a "coarse and offensive" manner is Constitutionally impermissible under the First and Fourteenth Amendments to the Constitution of the United States and, for the above and foregoing reasons, that part of the statute should be declared unconstitutional.

Respectfully submitted,

MARVIN O. TEAGUE
1314 Texas Avenue, Suite 1206
Houston, Texas 77002
(713) 222-1728

TOM S. MCCORKLE
500 Katy Building
Dallas, Texas 75202
(214) 742-1411

Counsel for Petitioner

Certificate of Service

I, TOM S. McCORKLE, Counsel for Petitioner, PARKER McVICKER, hereby certify that copies of the above and foregoing Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas have been mailed to the following persons:

Hon. Mark White	Hon. Joe Register
Attorney General of Texas	Angelina County Attorney
Supreme Court Building	County Courthouse
Austin, Texas 78711	Lufkin, Texas 75901

by placing same in the United States Mail, certified, postage prepaid on this the ——— day of ————, 1980.

/s/ Tom S. McCorkle

Appendix

EXHIBIT "A"

IN THE NAME AND BY AUTHORITY OF
THE STATE OF TEXAS

I, Lisa Fussell, being duly sworn, do state upon my oath that I have personal knowledge, and I charge that heretofore, and before the making and filing of this complaint, on or about the 2nd day of July, 1979, in the County of Angelina and State of Texas, after Parker McVicker, Defendant did then and there intentionally communicate by telephone in a coarse and offensive manner and by this action intentionally and knowingly alarmed Lisa Fussell, the recipient of said communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Lisa Fussell, Complainant

/s/ Joe Lee Register,
County Attorney,
Angelina County, Texas

EXHIBIT "B"

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

I, JOE LEE REGISTER, County Attorney of Angelina County, in said State, on the written affidavit of LISA FUSSELL a competent and credible person herewith filed in the County Court AT LAW in the County of Angelina and the State of Texas do present unto said court that on or about the 2nd day of July, A.D.1979, and before the making and filing of this information, in the County of Angelina and the State of Texas, one PARKER McVICKER, Defendant did then and there intentionally communicate by telephone in a coarse and offensive manner and by this action intentionally and knowingly alarmed Lisa Fussell, the recipient of said communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Joe Lee Register,
County Attorney,
Angelina County, Texas

EXHIBIT "C"

COUNTY COURT AT LAW

THE STATE OF TEXAS vs. PARKER McVICKER
IN COUNTY COURT AT LAW OF
ANGELINA COUNTY, TEXAS

No. 10367

October/December Term A.D. 1979
Date: 10/5, 1979

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, PARKER McVICKER, having been duly arraigned, appeared in person, in open court, his counsel also being present, and both parties announced ready for trial; and it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury in the trial of this cause and to submit this cause to the Court; and the Court having consented to the waiver of a jury herein, the information was read, and the Defendant entered his plea of guilty thereto, and thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in his plea; and it plainly appearing to the Court that the Defendant is sane and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea is by the Court received and here now entered of record upon the minutes of the court as the plea herein of said Defendant.

And the Court having heard all the evidence submitted for the State and the Defendant and argument of counsel is

of the opinion and so finds that the said Defendant is guilty of the offense of TELEPHONE HARASSMENT (ARTICLE 42.07 TEXAS PENAL CODE).

And it appearing to the Court that the Defendant, his counsel, and the State's attorney have agreed in writing in open court to waive a jury and to submit the assessment of Defendant's punishment to the Court; and the Court having consented to the waiver of a jury herein, and after having heard all the evidence submitted for the State and the Defendant and argument of counsel the Court is of the opinion and so finds the said Defendant's punishment should be by a fine $1,000.00.

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant, PARKER McVICKER, is guilty of the offense of TELEPHONE HARASSMENT (ARTICLE 42.07 TEXAS PENAL CODE) as found by the Court, and that he be punished as found by the Court, that is by a fine of $1,000.00 and that the State of Texas do have and recover of the said Defendant the amount of such fine, and all costs in this prosecution, for which execution may issue; and that the said Defendant be remanded to jail to await the further orders of the Court herein.

FILED: at 3:30 o'clock p.m., October 5, 1979.

/s/ David W. Cook,
County Court At Law

COUNTY COURT AT LAW

THE STATE OF TEXAS vs. PARKER McVICKER
IN COUNTY COURT AT LAW OF
ANGELINA COUNTY, TEXAS

No. 10367

October/December Term A.D. 1979
Date: 10/5, 1979

This day this cause being again called, the State appeared by her District Attorney, and the Defendant, PARKER McVICKER was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the judgment herein rendered and entered against the said Defendant. And thereupon the Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and the Defendant answered nothing in bar thereof, he having waived time for filing motion for new trial. Whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him as follows:

It is Ordered by the Court that the Defendant, PARKER McVICKER, who has been adjudged to be guilty of the offense of TELEPHONE HARASSMENT (ARTICLE 42.07 TEXAS PENAL CODE) be, and is hereby sentenced to pay a fine of ONE THOUSAND AND NO/100 ($1,000.00) Dollars, and that the State of Texas do have and recover of said Defendant all costs of this prosecution, for which execution may issue against the property of said Defendant, and the said Defendant, now being present in court, be committed to the custody of the Sheriff of ANGELINA

County, Texas, who shall forthwith confine him in the jail of said County to remain until he shall have purged himself by paying said fine and all costs are fully paid.

/s/ David W. Cook, Judge
County Court At Law

FILED: At 3:30 o'clock p.m., October 5, 1979.

/s/ Paul Selman, Clerk
County Court At Law

EXHIBIT "D"

Complaint Number 79-17

Complaint versus: Parker McVicker

Complainant: Grievance Committee No. 3B

GRIEVANCE COMMITTEE, DISTRICT 3B
STATE BAR OF TEXAS

The following Complaints have been filed against you by the Grievance Committee of District 3B, State Bar of Texas:

(1) Such attorney has violated disciplinary Rule Number 102(A)(3) in connection with the allegation set out in the facts leading up to Cause Number 10,369 styled *State of Texas vs. Parker McVicker* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

(2) Such attorney has violated disciplinary Rule Number 1-102(A)(6) in connection with the allegation set out in the facts leading up to Cause Number 10,369 styled *State of Texas vs. Parker McVicker* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

(3) Such attorney has violated disciplinary Rule Number 1-102(A)(2) in connection with the allegation set out in the facts leading up to Cause Number 10,950 styled *State of Texas vs. Lee J. Rawclift* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

(4) Such attorney has violated disciplinary Rule Number 1-102(A)(3) in connection with the allegation set out in the facts leading up to Cause Number 10,950 styled *State of Texas vs. Lee J. Rawclift* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

(5) Such attorney has violated disciplinary Rule

Number 1-102(A)(5) in connection with the allegation set out in the facts leading up to Cause Number 10,950 styled *State of Texas vs. Lee J. Rawclift* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

(6) Such attorney has violated disciplinary Rule Number 1-102(A)(6) in connection with the allegation set out in the facts leading up to Cause Number 10,950 styled *State of Texas vs. Lee J. Rawclift* in, and on the Docket of, the County Court at Law of Angelina County, Texas.

I certify that the information and statements submitted herewith and attached hereto are true and correct.

WITNESS my hand this 20th day of November, 1979.

/s/ William Drew Perkins,
Chairman, Grievance Committee,
District 3B, State Bar of Texas

EXHIBIT "E"

BEFORE THE GRIEVANCE COMMITTEE, DISTRICT 3B
THE STATE BAR OF TEXAS

COMPLAINT AGAINST
PARKER McVICKER NO. 79-17
OF LUFKIN, TEXAS

ORDER OF SUSPENSION

BE IT REMEMBERED that a complaint was docketed with the Grievance Committee, District No. 3B, State Bar of Texas, against Parker McVicker, a licensed attorney and member of the State Bar of Texas, residing and maintaining an office at Post Office Box 1747, Lufkin, Texas 75901, by the Grievance Committee of District 3B, as complainant, alleging certain acts of professional misconduct on the part of said Parker McVicker which occurred in Angelina County, Texas. The Committee has conducted a hearing on this complaint, at which Parker McVicker appeared and gave testimony on the complainant, and after considering other evidence submitted to it, the Committee has made the following findings of fact and conclusion of law:

I.

FINDING OF FACT

1. That Parker McVicker plead guilty in Cause Number 10,367 on the Docket of the County Court at Law of Angelina County, Texas, styled STATE OF TEXAS VS. PARKER McVICKER.

2. That Parker McVicker was guilty of the offense of which he was charged in said Cause Number 10,367 on the Docket of the County Court at Law of Angelina County,

Texas, styled STATE OF TEXAS VS. PARKER McVICKER.

3. That Parker McVicker made the telephone call as set out in the complaint filed as Cause Number 10,367 on the Docket of the County Court at Law of Angelina County, Texas, as alleged.

4. That the action of the said Parker McVicker in making such telephone call was an act involving moral turpitude.

5. That the action of the said Parker McVicker in making such telephone call adversely reflects upon his fitness to practice law.

6. That the action of the said Parker McVicker in pleading guilty in Cause Number 10,367 on the Docket of the County Court at Law of Angelina County, Texas, adversely reflects on his witness to practice law.

CONCLUSIONS OF LAW

1. That Parker McVicker violated Disciplinary Rule Number DR 1-102(A)(3).

2. That Parker McVicker violated Disciplinary Rule Number DR 1-102(A)(6).

II.

By reason of the aforesaid professional misconduct on the part of Parker McVicker, the Committee is of the opinion his license to practice law in the State of Texas should be suspended for a period of twenty-four (24) months.

IT IS ACCORDINGLY ORDERED that the license of Parker McVicker to practice law in the State of Texas be

and the same is hereby suspended for twenty-four months from the date upon which said Parker McVicker consents to the rendition and entry of this Judgment of Suspension by executing the form of consent immediately following this Order and having his acknowledgment thereto taken in accordance with the provisions of the Rules Governing the State Bar of Texas.

IT IS FURTHER ORDERED that Parker McVicker, during the period of his suspension, shall not give or render any services requiring the use of legal skill and knowledge, furnish any services or advice to any other attorney, counsel, or person whatsoever, appear as counsel or in any representative capacity in any proceeding in any court or before any administrative body, hold himself out to be a licensed attorney by virtue of an office sign, letterhead, business card, or display of his law license, or hold himself out to any person as being competent to give legal advice or counsel on any case or controversy. He shall not advise nor counsel any person in any manner whatsoever concerning the preparation of legal documents. Nothing contained in this Order shall be construed to prohibit said Parker McVicker from participating in the preparation of legal papers or documents or in other matters including legal work when such legal papers or documents are prepared or such matters participated in by him for his own proprietary interest and any transaction involving his own property, and provided further that nothing herein contained shall be construed to prohibit said Parker McVicker from doing any act which might properly and legally be done by any other person not licensed to practice law in the State of Texas.

IT IS FURTHER ORDERED that said Parker McVicker surrender the law license and permanent bar card issued to

the said Parker McVicker to the Clerk of the Supreme Court of the State of Texas.

In accordance with Article XII., Section 16(c), of the Rules Governing the State Bar of Texas, copies of this Judgment, together with copies of the complaint, shall be mailed to the General Counsel of the State Bar of Texas, the Clerk of the Supreme Court of Texas, and the Clerk of the District Court of Angelina County, Texas.

SIGNED this ——— day of June, 1980.

GRIEVANCE COMMITTEE
DISTRICT NO. 3B
STATE BAR OF TEXAS

By: _____
Chairperson

CONSENT TO GRIEVANCE COMMITTEE JUDGMENT

In connection with charges of professional misconduct filed against me and heard by your Committee, I hereby consent to entry of Judgment in the form submitted to me pursuant to Article XII., Section 16(c) of the State Bar Rules, suspending my license to practice law in the State of Texas for a period of twenty-four months from the date of this Consent.

SIGNED this ——— day of ———————, 1980.

_____
Parker McVicker

THE STATE OF TEXAS
COUNTY OF ANGELINA

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared Parker McVicker, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that the said Parker McVicker executed the same for the purposes and considerations therein expressed.

GIVEN UNDER my hand and seal of office this ——— day of ————————, 1980.

———————————————

Notary Public in and for
Angelina County, Texas

EXHIBIT "F"

**BEFORE THE GRIEVANCE COMMITTEE,
DISTRICT 3B
THE STATE BAR OF TEXAS**

COMPLAINT AGAINST
PARKER McVICKER NO. 79-17
OF LUFKIN, TEXAS

PARKER McVICKER'S OBJECTIONS TO
GRIEVANCE COMMITTEE'S FINDINGS OF FACT

TO THE HONARABLE MEMBERS OF THE GRIEVANCE COMMITTEE, DISTRICT 3B, THE STATE BAR OF TEXAS:

NOW COMES PARKER McVICKER, by and through the undersigned, Counsel of Record for the said PARKER McVICKER, who presents to the members of the said Grievance Committee, in the above styled and numbered cause, PARKER McVICKER'S OBJECTIONS TO GRIEVANCE COMMITTEE'S FINDINGS OF FACT and, for grounds and reasons therefore, would respectfully show unto the Committee the following:

I.

At the hearing held before the Grievance Committee in the City of Lufkin, Angelina County, State of Texas, on the 5th day of June, A.D. 1980, the only "non-hearsay" evidence presented to the Committee was by PARKER McVICKER himself when he personally testified before the Committee.

II.

The proposed Finding of Fact of the Grievance Committee, number 2, implies, if it does not express, that this

Committee heard witnesses concerning the alleged offense as set out in Cause No. 10,367. This, of course, is not true.

Furthermore, See Art. 12, Sec. 13, Rules Governing The State Bar of Texas, Vol. 1A, V.A.T.C.S., and see letter attached hereto, PARKER McVICKER requested that the alleged complaint in the stated alleged criminal offense be summoned to attend the hearing and give evidence. However, this request was not honored. Again, the only witness who personally appeared before the Committee was PARKER McVICKER himself.

III.

Furthermore, by the evidence adduced before the Grievance Committee, the sole and only basis for the action of the Committee, in bringing the accusation against the said PARKER McVICKER, was the Complaint, Information, judgment of conviction and sentence in Cause No. 10,367; copies of which are attached hereto.

IV.

The proposed Finding of Fact, number 4, is totally erroneous in law in that the allegations contained in the Complaint and Information, see attached documents, supra, do not in any way, form or fashion, constitute an act involving moral turpitude.

V.

The proposed Finding of Fact, number 5, is totally unsupported by the evidence presented to the Committee to show that a telephone call allegedly made by Parker McVicker in any way, fashion or form reflected upon the said PARKER McVICKER'S fitness to practice law, i.e., nothing was presented to the Committee to show a relationship

between a telephone call made by PARKER McVICKER and PARKER McVICKER'S fitness to practice law.

VI.

The proposed Finding of Fact, number 6, is totally unsupported by evidence, real or imaginary, to show that by pleading guilty to the alleged criminal offense it in any way, fashion or form reflected upon the said PARKER McVICKER'S fitness to practice law. To the contrary, by the evidence adduced at the hearing, PARKER McVICKER'S fitness to practice law was never made an issue at the hearing nor has same been questioned by anyone.

VII.

By virtue of the foregoing findings of fact being not true either in whole or part, excepting numbers 1 and 3, this renders the conclusions of law of the Committee erroneous. In this regard, the first conclusion of law reflects a conclusion that PARKER McVICKER violated DR 1-102(A)(3), i.e., "Engaged in illegal conduct involving moral turpitude." As noted, the Committee is relying upon the actions of the said PARKER McVICKER in reference to Cause No. 10,369, which is predicated in part upon a complaint and information, see supra, for its actions. However, assuming that the said PARKER McVICKER did "communicate by telephone" in a "coarse and offense manner," this in itself would not, legally, constitute moral turpitude. In fact, see page 11.5 of the Manual provided to members of the grievance committees by the State Bar of Texas, it is stated: "If the complaint involves only 'abusive language' or 'cursing' . . . then — even if this alleged misconduct took place in the practice of law — the following letter *might* be used." Thereafter, in the said form letter, it

is stated, concerning the use by an attorney of "abusive language" towards another and that this interfered with the other's job, health, etc.: "However, [these] matters you complain of do *not* constitute a violation of the Disciplinary Rules . . ."

It appears what the Committee is attempting to do is to invoke Sec. 6 of Art. 320-1 V.A.T.C.S., which provides for disbarment if an attorney has been convicted of a felony involving moral turpitude. There is not, to the undersigned attorney's knowledge a basis for disbarment, suspension, etc., where the offense is a criminal offense of a misdemeanor level or even if there is a misdemeanor involving moral turpitude. In the case of *Muniz v. State,* 575 SW2d 408, the question concerned whether "jumping bond" and "failing to appear in court" constituted a felony involving moral turpitude and it was held it did as a matter of law. However, that is a far cry from "communicating by telephone in a coarse and offense manner" as to one person certain language might be "coarse and offensive" whereas, to another the very same language might be common usage. "Moral turpitude crimes have one thing in common and that is *to everyone* the offense is morally reprehensible."

VIII.

Next, the Committee makes a conclusion, that is based upon its erroneous findings that PARKER McVICKER violated DR 1-102(A)(6), i.e., "Engaged in any other conduct that adversely reflects on his fitness to practice law."

It is submitted that where a grievance committee elects to base its accusations and its rulings on an alleged misdemeanor criminal offense, whether it does or does not involve moral turpitude, the latter which is not present

here, it is nevertheless incumbent upon that committee, in order to warrant taking affirmative action against an attorney generally and specifically, PARKER McVICKER, to show a relationship or correlation between the alleged misconduct and the fitness of the particular attorney to practice law. In other words, if an attorney were accused of a misdemeanor offense, it could never establish a basis for disbarment, suspension, etc., unless it were shown that the conduct or misconduct reflected upon the attorney's fitness to practice law. This would also be true even if the attorney were accused and convicted of a felony not involving moral turpitude such as felony driving while intoxicated as *there must be a* relationship or correlation between the act itself and that it reflected upon the attorney's fitness to practice law. The act itself, without more, would never be sufficient.

IX.

In reference to finding of fact number 6, due to it being a finding of fact by the Committee, it must, therefore, somehow, relate to one and/or both of the conclusions of law of the Committee. As to it being in reference to conclusion of law number 1, it is incomprehensible that the act of an attorney, or anyone else for that matter, in pleading guilty to a misdemeanor offense, would ever constitute conduct involving moral turpitude. The same would be true of conclusion of law number 2.

In sum, this Honorable Committee's conclusion, based upon its findings of fact, is totally dedicated to the erroneous assumption that the misdemeanor offense for which PARKER McVICKER was convicted is an offense involving moral turpitude. Unquestionably, the use of "abusive," "coarse," and "offensive" language, or using "curse words," to or in the presence of another, is not "good taste," and

should never be condoned, but the question before this Committee is not "good taste," whatever that may be, but whether the use of "coarse and offensive," language, whatever that may be, to another is such that it reflects on one's fitness to practice law.

If the use of "coarse and offensive" language, whatever that may be, by an attorney to another person is sufficient for disbarment, suspension, etc., then it is submitted, based upon the language the undersigned attorney has heard other attorneys use, who are members of the State Bar of Texas, then the membership of the State Bar of Texas may be vastly depleted to the point there will no longer be a need for grievance committees due to the small membership the Bar will then have as it will be a simple matter to merely post the names of those attorneys, in their respective cities, who use "bad language." Cf. *State of Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed. 2d 515 (1971).

WHEREFORE, PREMISES CONSIDERED, PARKER McVICKER prays that, in accordance with due process and due course of law, as guaranteed by the Constitutions of the United States of America and of the State of Texas, that this Grievance Committee strike the present findings of fact, prepare new ones, if any, and submit same to PARKER McVICKER for his approval or disapproval.

Respectfully submitted,

/s/ Marvin O. Teague
Counsel for Parker McVicker
914 Main, Suite 1101
Houston, Texas 77002
(713) 222-1728

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of JUNE, 1980, a true copy of the foregoing PARKER McVICKER'S OBJECTIONS TO THE GRIEVANCE COMMITTEE'S FINDINGS OF FACT was duly served upon Honorable William Drew Perkins at his known address as follows by certified mail, return receipt requested mail to:

Honorable William Drew Perkins
Chairman
Grievance Committee for
District 3B
Attorney at Law
P.O. Drawer 369
Lufkin, TX 75901

/s/ Marvin O. Teague

MARVIN O. TEAGUE
Attorney at Law
1101 Commerce Building
Houston, Texas 77002

June 2, 1980

Honorable William Drew Perkins
Attorney at Law
P.O. Drawer 369
Lufkin, TX 75901

RE: Grievance 79-17
Complaint against Parker McVicker

Dear Mr. Perkins:

This will acknowledge your letter to me dated May 29, 1980.

I do not know if the grievance committee has issued any sort of summons for Ms. Lisa Gaye Fussell and if it has, please disregard this letter. However, from what I have been able to learn concerning the facts, I would request, on behalf of Mr. McVicker, that the committee summon Ms. Fussell to the hearing in order that the members of the committee be completely informed as to what was or was not said over the telephone on the day in question and, if so, whether whatever was said, if anything, would or could be the basis for a grievance accusation.

Also, if there was a "tap" placed on the telephone and a recording of what, if any, conversation occurred, then I think this too should be available to the committee.

Thank you for your time and consideration in this regard.

Very truly yours,
/s/ Marvin O. Teague

MOT/jap

EXHIBIT "G"

No. 18244-80-9

THE STATE OF ARKANSAS

v.

PARKER McVICKER

IN THE DISTRICT COURT OF
ANGELINA COUNTY, TEXAS
———————— JUDICIAL DISTRICT

ORIGINAL FORMAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Grievance Committee for District Number 3-B, State Bar of Texas, and acting in the name of the State of Texas, hereinafter called Plaintiff, complaining of Parker McVicker, a resident of Angelina County, Texas, hereinafter called Defendant, and for cause of action would respectfully represent and show unto the Court the following:

I.

The Defendant is now, and has been at all times material hereto, and was at the time of the commission of the acts complained herein, a duly licensed attorney of the State of Texas and a member of the State Bar of Texas. The Defendant may be served with citation at 113 North 2nd, Lufkin, Angelina County, Texas.

II.

This suit is brought under and by virtue of the State Bar Act, Article 320a-1, Texas Revised Civil Statutes, and the Rules Governing the State Bar of Texas, as adopted,

promulgated and continued by the Supreme Court of Texas, particularly (but not by way of limitation) Article XII thereof, captioned "Discipline and Suspension of Members".

III.

Plaintiff would show that the acts of Parker McVicker, hereinafter detailed with more particularity, constituted fraudulent and dishonorable conduct and were each and all a violation of the Code of Professional Responsibility as would warrant McVicker's discipline by judgment of this Court. Such acts of professional misconduct arose out of the following facts:

Between March, 1979 and July 3, 1979, Parker McVicker made between twenty and thirty telephone calls to Mrs. Pauline Fussell and Lisa Fussell. In these calls, McVicker identified himself as "Richard" and used vulgar, indecent, and obscene language in a coarse and offensive manner.

This course of conduct on the part of Parker McVicker constitutes professional misconduct in violation of the Code of Professional Responsibility and supports allegations of misconduct as follows:

Count One

By placing the telephone calls to Mrs. Pauline Fussell and Lisa Fussell in which McVicker used vulgar, indecent, and obscene language in a coarse and offensive manner, the Defendant acted in violation of:

Disciplinary Rule (DR) 1-102(A)(3), which reads:

> "A lawyer shall not:
> Engage in illegal conduct involving moral turpitude."

DR 1-102(A)(6), which reads:

> "A lawyer shall not:
> Engage in any other conduct that adversely reflects on his fitness to practice law."

That each and all, and a combination of each and all, of the foregoing acts of misconduct on the part of Parker McVicker constituted dishonorable conduct and a lack of competence, skill, and professional concern as would warrant discipline by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendant be cited to appear and answer herein, and that upon final hearing hereof, the Defendant be REPRIMANDED, SUSPENDED, or DISBARRED as the facts shall warrant, and the Plaintiff have such other and further relief as may be proper and authorized by the law and the Rules Governing the State Bar of Texas, including all costs of court.

Respectfully submitted,
Jerry L. Zunker
General Counsel
Steven D. Peterson
First Assistant General Counsel
Gary McNeil
Assistant General Counsel
Charles W. Yett
Assistant General Counsel
Claude E. Ducloux
Assistant General Counsel

By: /s/ Charles W. Yett
State Bar Card No. 22153000
Attorney for Plaintiff
Austin, Texas 78711

EXHIBIT "H"

NO. ————

EX PARTE
PARKER McVICKER

IN COUNTY COURT AT LAW OF
ANGELINA COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PARKER McVICKER, hereinafter called the Petitioner or Applicant, who makes, in person, and files, by counsel, this Application for Writ of Habeas Corpus and, for grounds therefore, would respectfully show unto the Court the following:

I.

The Petitioner and Applicant was charged by Complaint and Information in this Honorable Court on July 3, 1979, in Cause Number 10,367, in that cause entitled The State of Texas vs. Parker McVicker, for the alleged crime of "telephone harassment," and, on October 5, 1979, pursuant to a plea of guilty to said charge, he was assessed a fine of One Thousand and No/100 Dollars ($1,000.00), which was subsequently paid by Petitioner.

II.

The Petitioner and Applicant brings this Application for Writ of Habeas Corpus to set aside the said Complaint, Information and Conviction[1] for the reasons that:

[1]See Exhibits "A", "B", and "C", attached hereto.

1) The portion of the statute under which the Petitioner and Applicant was charged is unconstitutional; and

2) The Complaint and Information do not charge a criminal offense against the penal laws of the State of Texas.

III.

The Petitioner and Applicant first attacks that part of Art. 42.07, P.C., which provides that for the criminal offense of "Harassment,"

> (a) A person commits an offense if he intentionally:
>
> (1) communicates by telephone . . . in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly . . . alarms the recipient or intends to . . . alarm the recipient.

IV.

In this regard, the Petitioner and Applicant would show that Due Process and Due Course of Law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and by Art. I, Sec. 19, of the Constitution of the State of Texas require that penal statutes be sufficiently specific to give fair notice of what conduct is forbidden or required in order to be held constitutional. Furthermore, the quoted part of said statute, see supra, is unconstitutionally and impermissibly vague and overbroad that deprives the Petitioner of due process and due course of law and, further, said statute infringes on conduct protected by the First Amendment to the United

States Constitution as well as Art. I, Sec. 8 of the Texas Constitution, and makes criminal otherwise protected conduct.

V.

The part of the statute in question is not limited to certain prescribed types of unreasonable conduct but it applies to any telephone call made "in a coarse and offensive manner." To one person a communication over the telephone might very well be construed to be "in a coarse and offensive manner," but to another person the telephone call might be made with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to ask. For example, under this provision of the statute, a consumer could make a telephone call to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters, and all such persons would thus be guilty of a crime. First Amendment protection is not limited to amiable communications. This part of the statute, by its very terms, would proscribe any telephone call made with intent to alarm, regardless of its purpose or nature. It would daily subject countless callers to the stigmatization of the criminal process at the election of their listeners who might perceive the call as having been made in "a coarse and offensive manner with the intent to alarm." This part of the statute makes criminal conduct that which is protected by the First and Fourteenth Amendments of the United States Constitution, and the like

provisions of the Texas Constitution, and is, therefore, overly broad.

In sum, this part of the statute prohibits speech that is beyond the pale of government regulation.

Some examples, in addition to those cited, should suffice. If "alarm" means to "arouse to a sense of danger," then that part of the statute would make it criminal for one person to call another, if done in a "coarse and offensive manner," to warn that persons of an impending storm, hurricane, tornado, fire, etc.

Earlier cases of the Court of Criminal Appeals, such as *Alobaidi v. State*, 433 SW2d 440 (1968); *Darnell v. State*, 161 SW 971 (1913); *LeBlanc v. State*, 441 SW2d 847 (1969); *Courtemanche v. State*, 507 SW2d 545 (1974); *Schuster v. State*, 450 SW2d 616 (1970); and *Collection Consultants, Inc. v. State*, 556 SW2d 787 (1977), are either not in point or are not applicable to the part of the statute under discussion.

It should be noted what the Petitioner's contentions *do not* encompass:

1. It does *not* encompass Sec. 42.07(a)(1), as to that part that provides that a person commits an offense if he intentionally communicates by telephone or in writing in vulgar, profane, obscene, or indecent language, and
2. It does not encompass subsection (2) or subsection (3).

The sole issue here involves that part of the statute which prohibits — a communication by telephone in a "coarse and offensive manner" and by such action "inten-

tionally and knowingly alarmed" the recipient. See and compare *Olson,* "The Texas Harassment Statute — is it Constitutional? *Walker v. Dillard,*" 17 *So.Tex. L. J.* 283, and *Steele,* "The Impact of the New Penal Code on First Amendment Freedoms," 38 *Tex. B. J.* 245, 253 (1975).

What do the words "coarse and offensive" mean? Due process requires that "laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). In *United States v. Harriss,* 347 U.S. 612 (1954), the Supreme Court of the United States declared that the underlying principle in cases involving vague statutes is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." 347 U.S. at 617. The test to be applied is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge,* 341 U.S. 223, 231 (1951). When first amendment rights and freedoms are involved, however, a stricter standard is to be applied. See *Ashton v. Kentucky,* 384 U.S. 195 (1966); *Smith v. California,* 361 U.S. 147 (1959); *Scull v. Virginia,* 359 U.S. 344 (1959).

In the instant case the statute at issue fails to give sufficient warning as to the proscribed conduct when measured by common understanding.

Words such as "coarse and offensive" do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. The meaning of these terms "depends upon the moral idiosyncracies of the persons who compose a particular court or jury. The standard of crime can be ever varying and the courts on appeal may be con-

stantly forced to become instruments of moral reform whenever there is a fluctuation in moral sentiment." *Olson, supra,* 17 *S.Tex.L.J.* at 298.

Of equal concern with the void for vagueness doctrine is the problem of overbreadth. A statute which proscribes activities which are protected under the First and Fourteenth Amendments, and Art. I, Sec. 8, as well as those activities which are not protected is overbroad and unconstitutional. Overbroad statutes have a "chilling effect" that tends to deter the exercise of protected speech.

This part of the statute is simply too vague, indefinite, inadequate and uncertain to withstand constitutional muster. These words have no fixed meaning. They are so vague and indefinite that they cannot, by themselves, imply a definite offense. Words to be construed as "coarse and offensive" vary with the different phases of society, depending upon the fastidious, refined, or primitive views of the community or among the particular persons when they are uttered. Words that are "coarse and offensive" in one place might be regarded in another harmless and in another even proper. See *Irven v. State,* 136 SW2d 608 (1940).

This part of the Texas harassment statute under examination in the instant case is similarly overbroad. A facial attack on the statute cannot be withstood if the statute may be applied to speech that is protected by the First and Fourteenth Amendments. *Gooding v. Wilson, supra; Lewis v. City of New Orleans, supra.* As the Court of Appeals for the Fifth Circuit stated in *Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), *cert. denied,* 397 U.S. 936 (1970):

> "The legislature cannot constitutionally use a 'blunder-buss' approach that sweeps in wide areas

> of protected speech even if its goal is to eradicate an evil undeniably caused by a smaller included area of unprotected expression; it cannot simply decide that 'a certain kind of speech is, itself, harmful and unlawful.' "

415 F.2d at 671 (footnote omitted).

Under Section 42.07(a)(1), the words used in the statute are susceptible of overly broad application due to subjective influence. One commentator has written that "[a] person may be convicted under the Texas statute, as it now stands, for using language he may not know to be prohibited and by being negligent in failing to discover beforehand whether the language might 'annoy' or 'alarm' the recipient." *Olson, supra,* 17 *S.Tex.L.J.* at 300.

Professor Walter W. Steele, Jr. has called §42.07 a textbook case of vagueness and overbreadth. He states:

> Section 42.07 requires that the recipient of the communication be annoyed or alarmed. But the only manner in which the recipient's annoyance can be known is by the recipient's statement to that effect. Every person has his own unique scale of annoyance, and accurate determination of that scale is impossible to judge. Furthermore, the Harassment section is so broad that it includes callers who have every right and reason to intentionally and knowingly annoy or alarm the recipient of the call.

Steele, "The Impact of the New Penal Code on First Amendment Freedoms," 38 *Tex.B.J.* 245, 253 (1975).

This part of the Texas harassment statute proscribes

language that is protected as well as language that is not protected by the First and Fourteenth Amendments and Art. I, Sec. 8 of the Texas Constitution. It is not so narrowly drawn to be limited to "fighting words." *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). In the words of the Supreme Court in *Cohen,* "one man's vulgarity is another's lyric." 403 U.S. at 25. As long as the means are peaceful, "the communication need not meet standards of acceptibility." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). Section 42.07(a)(1) proscribes language whether used peacefully or not. It is wholly subjective in that one cannot know what language would annoy or alarm the recipient until the *recipient* speaks. It seeks to regulate speech that is protected by the First and Fourteenth Amendments and is, therefore, facially overbroad. See also Annotation, "Validity, Construction, and Application of State Criminal Statutes Forbidding Use of Telephone to Annoy or Harass," by Wayne F. Foster, 95 *A.L.R.* 3*d* commencing at page 411.

Thus, for the above and foregoing reasons, the Court should declare the above provisions of Art. 42.07, P.C. unconstitutional, null and void.

VI.

The Complaint and Information, which charged the Petitioner and Applicant with an alleged criminal wrong, is unconstitutional, defective, null and void, in that it is the constitutional right of an accused to be informed of the nature and cause of the accusation against him and he is entitled to a plain statement of the charge against him. No Complaint and Information, omitting key language allegedly used by the defendant, can ever be sufficient to state a criminal offense under the statute. Here, the Petitioner was

not told how the communication was done in a "coarse and offensive manner" nor was he told how this act "alarmed" the recipient. Without stating the "how" and the "words" used that would constitute "coarse and offensive manner," the mere tracking of the statute is not sufficient to state a criminal wrong. See *Haecker v. State*, 571 SW2d 920.

Further, this complaint and information is so vague and lacking in acceptable standards of guilty conduct as to be incapable of giving a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. See *Palmer v. City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed. 2d 89 (1971); *United States v. Harris*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); *Cole v. Arkansas*, 68 S.Ct. 514, 333 U.S. 196, 92 L.Ed. 644 (1948); and *Voelkel v. State*, 501 SW2d 313.

Also, Article 21.04, C.C.P., provides that: "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." See also Art. I, Sec. 10, Texas Constitution. The Complaint and Informantion in this cause is in such form that a valid legal judgment of guilt cannot be based thereon.

The conclusionary statement that the "Defendant did then and there intentionally communicate by telephone in a coarse and offensive manner and by this action intentionally and knowingly alarmed Lisa Fussell, the recipient of said communication," without stating what words were spoken or said and how the communication alarmed the recipient of said communication is so deficient as to fail under both due process as well as due course of law. See also *American Plant Food Corporation v. State*, 508 SW2d 598.

It is the intent of Article I, Section 10 of the Texas Constitution and of the Fourteenth Amendment to the United States Constitution that an accused in a particular case be given sufficient information upon which he may prepare his defense and this information must come from the face of the Complaint and Information. See *Terry v. State,* 471 SW2d 848; *Baker v. State,* 58 SW2d 534; and *Voelkel v. State,* 501 SW2d 313. If no offense has been properly alleged, then it will not support a valid conviction and may be attacked collaterally. See *Standley v. State,* 517 SW2d 538.

Thus, for the above and foregoing reasons, if no other, the conviction of the Petitioner and Applicant is null and void and should be set aside and held for naught.

PRAYER

WHEREFORE, Petitioner prays that this Honorable Court order the Respondent to show cause why the Writ should not be granted and to order production by the State of such papers, transcripts, statement of facts, and other records of this Cause as may be necessary for proper consideration of the issues involved, and to conduct a plenary hearing as may be necessary for a determination of this cause and, after said hearing, grant the relief the Petitioner and Applicant seeks by holding the said part of Art. 42.07, P.C., unconstitutional, and by further holding the Complaint and Information is null and void.

Respectfully submitted,

/s/ Marvin O. Teague
Attorney at Law
914 Main, Suite 1101
Houston, Texas 77002
(713) 222-1728

THE STATE OF TEXAS)
COUNTY OF ANGELINA)

BEFORE ME, the undersigned authority, on this day personally appeared PARKER McVICKER who, being by me duly sworn, upon oath, says that he is the Petitioner in the above and foregoing petition, that he has read said petition and the factual allegations of same are true and correct.

Parker McVicker

SUBSCRIBED AND SWORN to before me by the said PARKER McVICKER, this ——— day of ————, 1980, to certify which witness my hand and seal of office.

Notary Public in and for

Angelina County, Texas

My Commission Expires:

CERTIFICATE OF SERVICE

I, MARVIN O. TEAGUE, Attorney for Petitioner, PARKER McVICKER, hereby certify that copies of the above and foregoing Application for State Post-Conviction Writ of Habeas Corpus, have been mailed to the following persons:

Hon. Mark White
Attorney General
Supreme Court Building
Austin, TX 78711

Hon. Joe L. Register
County Attorney
Angelina County, Texas
Courthouse
Lufkin, TX 75901

Hon. Gerald Goodwin
District Attorney
Angelina County, Texas
Courthouse
Lufkin, TX 75901

by placing same in the United States Mail, certified, postage prepaid, on this the ——— day of ————————, 1980.

———————————————

Marvin O. Teague

EXHIBIT "I"

IN THE COUNTY COURT AT LAW,
ANGELINA COUNTY, STATE OF TEXAS

EX PARTE)
) CAUSE NO. 10367
PARKER McVICKER)

APPEARANCES

For Petitioner:

Mr. Marvin Teague
Attorney at Law
Houston, Texas

For Respondent:

Mr. Joe Register
County Attorney
Lufkin, Texas

PROCEEDINGS

In a post-conviction writ of habeas corpus hearing held on September 2nd, 1980, in Lufkin, Texas, before the honorable David M. Cook, Angelina County Court-At-Law-Judge, the following proceedings were had and testimony adduced:

THE COURT: This is a hearing in Criminal Cause No. 10,367, styled Ex Parte Parker McVicker. The record will reflect that Mr. Marvin Teague is present as movant, and Mr. Joe Register is present as the County Attorney.

Mr. Teague, you may proceed.

MR. TEAGUE: Thank you. If the Court please, we would

first request permission to call the Clerk of the Court and have that person bring the file pertaining to Cause No. 10,367.

THE COURT: You can do so if you wish, but I have the Clerk's file with me. But if you need the Clerk to testify —

MR. TEAGUE: Essentially, all I wanted to do is to prove it up, unless Mr. Register might stipulate to that.

MR. REGISTER: I think we can stipulate that that is the file of the County Clerk's Office, and the Court's file.

MR. TEAGUE: Could we have this marked as Petitioner's Exhibit No. 1, please?

MR. REGISTER: We would not object to a copy of the file being made and the copy being marked as the exhibit.

THE COURT: Any objection, Mr. Teague, to a copy?

MR. TEAGUE: No, sir. Substituting a copy would be fine, Your Honor.

(WHEREUPON PETITIONER'S EXHIBIT NO. 1 WAS MARKED FOR IDENTIFICATION)

MR. TEAGUE: At this time, if the Court please, we would offer into evidence what has been marked as Petitioner's Exhibit No. 1, which contains the entire file in reference to Cause No. 10,367, entitled The State of Texas vs. Parker McVicker, and with the agreement that copies may be made thereof.

MR. REGISTER: Respondent has no objections.

THE COURT: So admitted at this time.

MR. TEAGUE: Judge, we would have one request that as a result of the delay in the mail, it seems like the original of

the application that's on file with the Court did not get up here for about two or three weeks for some reason.

As such, we went ahead and sent a copy of the original of the application and we have the original with us and it is in all things identical to the one on file, because it is the original, we request permission to substitute the original that we have for the copy that is on file.

MR. REGISTER: No objection.

(WHREUPON A BRIEF DISCUSSION AT THE BENCH TOOK PLACE)

MR. TEAGUE: If I'm correct, the Court has given it the same cause number as in the original?

THE COURT: Right.

MR. TEAGUE: May I speak to counsel for a minute?

THE COURT: Sure.

MR. TEAGUE: We have an agreement and stipulation by and between counsel for the Petitioner, myself, and Mr. Register, and the Petitioner himself, Mr. Parker McVicker, in that if Parker McVicker were called to testify in this cause, the evidence would show that he is one and the same Parker McVicker as the Parker McVicker named in Cause No. 10,367, entitled The State of Texas vs. Parker McVicker, and as reflected by Petitioner's Exhibit No. 1 that has been admitted into evidence.

MR. REGISTER: So stipulated.

MR. TEAGUE: Mr. McVicker, is that our agreement and stipulation?

MR. PARKER McVICKER: That's fine. Yes.

MR. TEAGUE: Judge, we have one other matter that we need to bring to the attention of the Court, however.

It's in reference to the showing of either collateral disabilities or collateral consequences of the conviction itself.

Section 19 of the State Bar Grievance Rules provides that the proceedings that are held shall be kept in private and shall be kept private.

I'm not sure exactly what that means, but without running into any sort of risk with reference to those rules, we have prepared a sealed envelope memorandum pertaining to those rules in order to show the issue of collateral consequences or collateral disabilities as I think we must do.

I bring that to the attention of the Court. I don't know how at best it should be handled. I think this would be primarily for appeal purposes, should the case be appealed, so the appellate court would have the necessary documents pertaining to what has gone on in reference to the grievance committee.

I would defer to the Court to the calamity that I find myself in. The rule says, "the proceedings shall be kept private". And without going into those proceedings this is the best I've been able to come up with as far as being able to perfect the record on the thing.

THE COURT: Mr. Teague, I don't know of any way. If they are introduced as an exhibit here, then they would become part of the public proceedings.

MR. TEAGUE: Well, unless the Court ordered the documents sealed and simply made a part of the record itself, should there be an appeal.

THE COURT: I wouldn't be inclined to do that.

When they say that the proceedings should be private, I'm in agreement and aware of that, but any proceedings that are held that relate to it or any part of it being conducted in private or sealed record — Any response Mr. Register?

MR. REGISTER: Judge, is it the intent of the Petitioner to offer this as an exhibit in this case?

MR. TEAGUE: Yes.

MR. REGISTER: We object. I don't see how that could be offered without first of all me viewing the same. And if I view the same then it's part of the file and if it's part of the file, then it's part of the public record.

I think I'm going to object to it as being immaterial to the writ anyway.

MR. TEAGUE: Well, I think the Court understands what my fear is as far as who might or might not see what we have prepared.

THE COURT: For the record, Mr. Teague, you've made every diligent effort to comply with what someone might interpret the State Bar's rules to mean. Certainly you're not deliberately violating any rules of ethics there.

MR. TEAGUE: We would call Mr. McVicker, Your Honor.

* * *

PARKER McVICKER, having been sworn by the Court to tell the truth and nothing but the truth, testified upon his oath as follows:

EXAMINATION
BY MR. TEAGUE

Q. For the record would you please state your full name?

A. Parker McVicker.

Q. And Mr. McVicker, you are the Petitioner on the application in the cause pending before the Court at this time, are you not?

A. Yes.

Q. Now, I'll ask you whether or not you are the one and the same Parker McVicker who is named in a complaint bearing number 79-17?

A. Yes.

Q. All right. And has a grievance complaint made against you whereby certain allegations were made concerning a conviction in Cause No. 10,367?

A. Yes.

Q. And I'll ask you whether or not in reference to that complaint, is it still pending at this time?

A. Yes.

Q. It has not been finally adjudicated?

A. No.

Q. And in refereonce to or pursuant to a hearing before a local Grievance Committee, was the conviction in Cause No. 10,367 used in reference to certain findings of fact that a local Grievance Committee made?

A. Yes.

Q. And is it not a fact that that conviction in Cause No. 10,367 has been used as a basis for the Grievance Committee's complaint?

A. Yes.

Q. And at this time do you know where the matter is presently pending?

A. Well, not rightly; no. I think it's pending —

Q. Well, let me ask —

A. I believe the local committee has —

Q. Okay. Let me ask it this way. Have you received any notification that the matter is now pending in the Office of the General Counsel of the State Bar of Texas?

A. That's correct. I received information that he has been awarded the proxy of the local committee to do what he sees fit on it.

MR. REGISTER: Your Honor, we object at this time to the line of questioning because it's leading and irrelevant to the writ of habeas corpus that is filed with this Court.

THE COURT: For the time being the objection is overruled. Proceed.

MR. TEAGUE: We pass the witness, Your Honor.

THE COURT: Any questions, Mr. Register?

MR. REGISTER: No questions.

THE COURT: Thank you, Mr. McVicker, you may step down.

MR. TEAGUE: May I have a few moments, Your Honor?

THE COURT: Yes.

MR. TEAGUE: If the Court please, that is all the evidence that the Petitioner and applicant has in reference to the application, and we would rest at this time.

THE COURT: Thank you, Mr. Teague. Mr. Register?

MR. REGISTER: No, sir. We have no testimony in this case at all other than comments after the movant makes his comments.

THE COURT: Counsel wish any arguments or statements?

MR. TEAGUE: Yes, Your Honor.

If the Court please, Mr. Register, we would make the following opening comments rather than be duplicitous as to what is set out in the application of the writ of habeas corpus.

I think the Court very well understands our position from what we've said in the application concerning the statutes as well as the complaint and information.

As to the relevancy of the pending action before the State Bar of Texas or the General Counsel of Texas of the State Bar as well as the Grievance Committee of the State Bar of Texas, we would simply refer the Court to a couple of cases.

As far as jurisdiction goes, I think the Court is well aware of the case of Carafus vs. Lavalle. It's 391 U.S. 234, 88 Supreme Court Reports, 1556 and 20 Lawyer's Edition, Second, 554.

That case came down in 1968, and basically stands for the proposition that even though a person has completed his or her sentence that nevertheless the person can still

complain if he or she is sustaining or receiving so-called collateral disabilities as a result of that sentence.

I think the Court is aware that previously that a person could not make such an attack where they had served out their respective sentences.

The nearest case I've found concerning this is a case from the Court of Criminal Appeals that I mentioned in Clark vs. State. I don't have the citation but it's No. 60073, of May 16th, 1979. This involved an inmate who was making a complaint about a conviction on the basis that this was effecting or depriving him from obtaining parole from the State of Texas.

The Court of Criminal Appeals ruled in that case that that constituted a collateral consequence or a collateral disability and therefore, the individual was entitled to pursue his point.

In a case out of the Fifth Circuit of Mathews vs. Florida which probably comes closer to our fact or situation than any I've been able to find. It's 463, Federal Second, 679.

There an individual was assessed a jail term as well as a fine. He served out the jail time and paid the fine. However, as a result of that conviction he lost "points on his driver's license record." Apparently, in the State of Florida for that particular offense the individual was penalized by virtue of his driver's license and his driver's license report.

So therefore, he came forward and filed a writ challenging the validity of the conviction for which he had already served his time and already paid his fine. And in there the Court said that in addition to the actual finding of loss and the precarious position in which his driver's

license had now been placed, that Mathews may very well have sustained the same repercussions effecting his career and his reputation that compelled the Supreme Court to reach its conclusion.

I think essentially the complaint was that he was tried without a lawyer rendering and making the conviction void.

I don't think anyone could seriously argue, if the Court please, that where we have an individual who is licensed as a lawyer whereby a conviction is being used to take action towards that license, that that in itself would not constitute a collateral disability or a collateral consequence.

So in summary, if the Court please, I see no question as far as this Court having jurisdiction to act on what is before the Court in the application of writ of habeas corpus.

I submit that based on the Supreme Court decision of Carafus vs. Lavalee as well as the cases that have followed Carafus, that the Court does in fact have jurisdiction.

Lastly, I would simply like to read briefly a quote from Carafus that the Supreme Court stated in the opinion; and that is "It is clear that Petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses, he cannot serve as an official of a labor union for a specified period of time, he cannot vote in any election held in New York State, he cannot serve as a juror. Because of these 'disabilities or burdens which may flow from' Petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.

"On account of these 'collateral consequences', the case is not moot."

As far as the challenges made to the complaint and information as well as the statute, I think we have set it out in the application; and we would at this time submit the matter to the Court.

THE COURT: Thank you, Mr. Teague. Mr. Register?

MR. REGISTER: Just a brief comment to Mr. Teague's statements to the Court.

First of all, it would be my opinion based on the law of the State of Texas and from reading the Code of Criminal Procedure that this is not the way to perfect one's appeal and to attack a statute for the reason that it is unconstitutional.

In this case here I would urge the Court to review the procedure in perfecting these appeals.

The man in this case has paid his fine. He did not receive a jail sentence; and under the time that he had to perfect his appeal he has not perfected that appeal. And it would be my opinion of the statutes and all the cases in our State and referring to the Code of Criminal Procedure, that this Court is without jurisdiction either to grant or to deny this writ of habeas corpus and the relief requested therein. And as to the collateral consequences of the proceeding that Mr. McVicker went through, I think you have a little bit different situation with this case here, Judge; based on the failure of Mr. McVicker, who is a lawyer and should have known by his entering a plea of guilty to the charge that this would be a possibility.

I think it's a case of after the mule is out of the barn, so to speak, he's trying to shut the door. I think his timing is a little short in accomplishing this purpose.

We urge the Court to find there is no jurisdiction even to consider this writ and that the same should be dismissed.

THE COURT: Do you have any final statements, Mr. Teague?

MR. TEAGUE: Judge, just briefly in reference to Mr. Register's argument that, if I understand it correctly, if an individual fails to appeal his or her conviction, then that person has forever waived attacking the validity of that conviction for that very reason.

I submit that that has not been the law, at least since 1968 when Carafus was handed down by the Supreme Court of the United States. And interestingly if an individual should pay, if there's a fine assessed that is the only punishment assessed, and the individual goes in and pays the fine, then that person cannot appeal, as the Court well knows, and the appeal would be dismissed if he or she tries to appeal.

However, the cases are legion where a person has been tried without counsel and was indigent and did not waive counsel and did not appeal his or her conviction, and came back later on either with a post-conviction habeas corpus or with a State habeas corpus or a Federal habeas corpus and succeeded in his or her contentions.

I think generally the rule is that you can come back with a writ of habeas corpus to attack the conviction if the conviction is in fact attackable.

I think as I mentioned since 1968, the Supreme Court as well as the Court of Criminal Appeals as well as the 5th Circuit has taken a very liberal view as to what constitutes

or does not constitute collateral disabilities or collateral consequences.

And I think the case of Mathews vs. Florida is very much a point. There, just as in our case, a fine was assessed and the fine was paid. Apparently there was no appeal in that conviction and an individual nevertheless was permitted and did come back via a writ of habeas corpus.

So I think in response to Mr. Register's argument as to the mootness question, I think it's simply answered by the cases that have come down at least in the last 12 years.

I believe that's all I have to say, Your Honor.

THE COURT: Thank you, Mr. Teague.

This afternoon it's the finding of the Court that jurisdiction is not proper in this matter in this Court and that jurisdiction lacks; and therefore the writ is dismissed at this time.

Thank you, gentlemen.

MR. TEAGUE: For the purpose of the record, could we note our exception and we would give notice of appeal to the Court of Criminal Appeals concerning the Court's ruling?

THE COURT: Yes, sir. And the record will reflect that.

MR. TEAGUE: Thank you.

* * *

THE STATE OF TEXAS:
COUNTY OF ANGELINA:

I, MICHAEL KING, OFFICIAL COURT REPORTER for the County of Angelina, State of Texas, do hereby certify that the above and foregoing 24 pages of typewritten manuscript constitute a true and accurate record of the proceedings had and testimony adduced at the Angelina County Court-At-Law Court; Lufkin, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 8th day of September, 1980.

/s/ Michael King
Official Court Reporter
for Angelina County

We, the undersigned attorneys of record hereby agree that the foregoing pages contain a full, true, and correct Statement of Facts upon said trial.

_____ _____

Attorney for Petitioner Attorney for Respondent

Examined, approved, and ordered filed as the Official Statement of Facts on the Habeas Corpus Hearing in Cause No. 10,367, styled Ex Parte, Parker McVicker.

/s/ David M. Cook
Judge Presiding
DATE: Sept. 8, 1980

The following 18 pages of exhibits constitute:

PETITIONER'S EXHIBIT NO. 1

EXHIBIT "J"[4]

NO. ————————

EX PARTE PARKER McVICKER

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES PARKER McVICKER, hereinafter called the Petitioner or Applicant, who makes, in person, and files, by counsel, this Application for Writ of Habeas Corpus and, for grounds therefor, would respectfully show unto the Court the following:

I.

The Petitioner and Applicant was charged by Complaint and Information in the County Court at Law of Angelina County, Texas, on July 3, 1979, in Cause Number 10,367, in that cause entitled the State of Texas vs. Parker McVicker, for the alleged crime of "telephone harassment," and, on October 5, 1979, pursuant to a plea of guilty to said charge, he was assessed a fine of ONE THOUSAND AND NO/100 DOLLARS ($1,000.00), which was subsequently paid by Petitioner.

II.

The Petitioner and Applicant brings this Application for Writ of Habeas Corpus to set aside the said Complaint,

[4]The exhibits attached to the application, due to duplicity, have been deleted.

Information and Conviction[1] for the reasons that:

1) The portion of the statute under which the Petitioner and Applicant was charged is unconstitutional; and

2) The Complaint and Information do not charge a criminal offense against the penal laws of the State of Texas.

III.

Subsequent to said conviction, on or about the 20th day of November, A.D., 1979, the Chairman of the Grievance Committee, District 3B, State Bar of Texas, in its Cause Number 79-17, filed a complaint against the Petitioner which complaint was predicated upon the aforesaid conviction. On June 5, 1980, a hearing on said complaint was conducted. As a result of the hearing, certain unfavorable recommendations were made by the Grievance Committee and the matter is now pending with the General Counsel of the State Bar of Texas in Austin, Texas. Due to Section 19 of the State Bar Grievance Rules, which provides the proceedings of the grievance committee shall be kept private, none of the documents pertaining to the actions of the Grievance Committee are attached hereto.

On September 2, 1980, the convicting Court, Honorable David Cook Presiding, pursuant to an Application for Writ of Habeas Corpus being filed in that Court, a copy of which is attached hereto and made a part hereof for all purposes of this Application,[2] conducted a hearing on said Application. A transaction of the hearing, as well as the exhibits introduced, is attached.[3]

---

[2]See Exhibit "D", attached hereto.

[1]See Exhibits "A", "B", and "C", attached hereto.

[3]See Exhibit "E", attached hereto.

At the conclusion of said hearing, the trial court judge ruled that the Court did not have jurisdiction of the cause and dismissed the application for writ of habeas corpus. See *Phelper v. State*, 433 SW2d 897; *Ex parte Brewer*, 452 SW2d 452.

The Petitioner and Applicant therefore invokes the original jurisdiction of this Honorable Court, See Art. 5, Sec. 5, of the Constitution of the State of Texas, as he has no other remedy at law to challenge his conviction.

IV.

Due to the fact that Petitioner is suffering collateral consequences or collateral disabilities as a result of his conviction, the issue regarding the validity of his conviction is not moot. As the Supreme Court said in *Carafas v. La Valle*, 391 U.S. 234, 237-38:

> It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens (which) may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." . . . On account of these "collateral consequences," the case is not moot.

Recently, the Fifth Circuit, in *Matthews v. Florida*, 463 F.2d 679 (1972), ruled that *Carafas*, supra, applied to a situation in which a jail term was levied and served and fines were assessed and paid. In addition to the punishment

assessed, the petitioner there lost "points" on his driver's license. The Court noted, at page 681:

> "In addition to the actual financial loss and the precarious position in which his driver's license has now been placed, Matthews may very well have sustained the same 'repercussions affecting his career and his reputation' that compelled the Supreme Court to reach its conclusion in Argersinger."

This Honorable Court, as well, has had occasion in the past to discuss the issue of "collateral consequences" or "collateral disabilities." See *Clark v. State*, No. 60,073, May 16, 1979, where Judge Roberts discussed this issue, citing *Ex parte Walters*, 566 SW2d 622, and *Ex parte Harp*, 561 SW 2d 180, for authority, and ruled that merely because the Petitioner in that cause had served his sentence that this did not render the issue moot because of the serious collateral consequences arising from a felony conviction which Petitioner was then attacking.

In this respect, the Petitioner is a licensed attorney of the State Bar of Texas. Due to the conviction he suffered, it is now being used to take action against him by the State Bar of Texas. Unquestionably, see *Matthews*, supra, he is suffering collateral disabilities or collateral consequences from this conviction. Thus, this Honorable Court has jurisdiction over this cause.

There are only two (2) questions in this cause, i.e.: 1) Is that part of the statute attacked valid and 2) are the complaint and information void? Due to this, there should be no necessity for any sort of hearing as each question posed is a question of law and not fact.

V.

The Petitioner and Applicant first attack that part of Art. 42.07, P.C., which provides that for the criminal offense of "Harassment,"

> (a) A person commits an offense if he intentionally:
>
> (1) communicates by telephone . . . in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly . . . alarms the recipient or intends to . . . alarm the recipient.

VI.

In this regard, the Petitioner and Applicant would show that Due Process and Due Course of Law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and by Art. 1, Sec. 19, of the Constitution of the State of Texas, require that penal statutes be sufficiently specific to give fair notice of what conduct is forbidden or required in order to be held constitutional. Furthermore, the quoted part of said statute, see supra, is unconstitutionally and impermissibly vague and overboard that deprives the Petitioner of due process and due course of law and, further, said statute infringes on conduct protected by the First Amendment to the United States Constitution as well as Art. I, Sec. 8 of the Texas Constitution, and makes criminal otherwise protected conduct.

VII.

The part of the statute in question is not limited to certain prescribed types of unreasonable conduct but it applies to any telephone call made "in a coarse and offensive

manner." To one person a communication over the telephone might very well be construed to be "in a coarse and offensive manner," but to another person the telephone call might be made with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to ask. For example, under this provision of the statute, a consumer could make a telephone call to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters, and all such persons would thus be guilty of a crime. First Amendment protection is not limited to amiable communications. This part of the statute, by its very terms, would proscribe any telephone call made with intent to alarm, regardless of its purpose or nature. It would daily subject countless callers to the stigmatization of the criminal process at the election of their listeners who might perceive the call as having been made in "a coarse and offensive manner with the intent to alarm." This part of the statute makes criminal conduct that which is protected by the First and Fourteenth Amendments of the United States Constitution, and the like provisions of the Texas Constitution, and is, therefore, overly broad.

In sum, this part of the statute prohibits speech that is beyond the pale of government regulation.

Some examples, in addition to those cited, should suffice. If "alarm" means to "arouse to a sense of danger," then the part of the statute would make it criminal for one

person to call another, if done in a "coarse and offensive manner," to warn that person of an impending storm, hurricane, tornado, fire, etc.

Earlier cases of the Court of Criminal Appeals, such as *Alobaidi v. State,* 433 SW2d 440 (1968); *Darnell v. State,* 161 SW 971 (1913); *LeBlanc v. State,* 441 SW2d 847 (1969); *Courtemanche v. State,* 507 SW2d 545 (1974); *Schuster v. State,* 556 SW2d 787 (1977), are either not in point or are not applicable to the part of the statute under discussion.

It should be noted what the Petitioner's contentions *do not* encompass:

1. It does *not* encompass Sec. 42.07(a)(1), as to that part that provides that a person commits an offense if he intentionally communicates by telephone or in writing in vulgar, profance, obscene, or indecent language, and
2. It does not encompass subsection (2) or subsection (3).

The sole issue here involves that part of the statute which prohibits a communication by telephone in a "coarse and offensive manner" and by such action "intentionally and knowingly alarmed" the recipient. See and compare *Olson,* "The Texas Harassment Statute — Is it Constitutional? *Walker v. Dillard,*" 17 *So.Tex.L.J.* 283, and *Steele,* "The Impact of the New Penal Code on First Amendment Freedoms, 38 *Tex.B.J.* 245, 253 (1975).

What do the words "coarse and offensive" mean? Due process requires that "laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In *United States v. Harris,* 347 U.S. 612 (1954), the Supreme Court of the United States declared that the underlying principle in cases involving vague statutes is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." 347 U.S. at 617. The test to be applied is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. DeGeorge,* 341 U.S. 223, 231 (1951). When First Amendment rights and freedoms are involved, however, a stricter standard is to be applied. See *Ashton v. Kentucky,* 384 U.S. 195 (1966); *Smith v. California,* 361 U.S. 147 (1959); *Scull v. Virginia,* 359 U.S. (1959).

In the instant case the statute at issue fails to give sufficient warning as to the proscribed conduct when measured by common understanding.

Words such as "coarse and offensive" do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. The meaning of these terms "depends upon the moral idiosyncracies of the persons who compose a particular court or jury." The standard of crime can be ever varying and the courts on appeal may be constantly forced to become instruments of moral reform whenever there is a fluctuation in moral sentiment." *Olson, supra,* 17 *S.Tex.L.J.* at 298.

Of equal concern with the void for vagueness doctrine is the problem of overbreadth. A statute which proscribes activities which are protected under the First and Fourteenth Amendments, and Art. I, Sec. 8, as well as those activities which are not protected is overboard and un-

constitutional. Overbroad statutes have a "chilling effect" that tends to deter the exercise of protected speech.

This part of the statute is simply too vague, indefinite, inadequate and uncertain to withstand constitutional muster. These words have no fixed meaning. They are so vague and indefinite that they cannot, by themselves, imply a definite offense. Words to be construed as "coarse and offensive" vary with the different phases of society, depending upon the fastidious, refined, or primitive views of the community or among the particular persons when they are uttered. Words that are "coarse and offensive" in one place might be regarded in another harmless and in another even proper. See *Irven v. State,* 136 SW2d 608 (1940).

This part of the Texas harassment statute under examination in the instant case is similarly overbroad. A facial attack on the statute cannot be withstood if the statute may be applied to speech that is protected by the First and Fourteenth Amendments. *Gooding v. Wilson, supra; Lewis v. City of New Orleans, supra.* As the Court of Appeals for the Fifth Circuit stated in *Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), *cert. denied,* 397 U.S. 396 (1970).

> "The legislature cannot constitutionally use a 'blunder-buss' approach that sweeps in wide areas of protected speech even if its goal is to eradicate an evil undeniably caused by a smaller included area of unprotected expression; it cannot simply decide that 'a certain kind of speech is, itself, harmful and unlawful.' "

415 F.2d at 671 (footnote omitted).

Under Section 42.07(a)(1), the words used in the

statute are susceptible of overly broad application due to subjective influence. One commentator has written that "[a] person may be convicted under the Texas statute, as it now stands, for using language he may not know to be prohibited and by being negligent in failing to discover beforehand whether the language might 'annoy' or 'alarm' the recipient." *Olson, supra,* 17 *S.Tex.L.J.* at 300.

Professor Walter W. Steele, Jr. has called §42.07 a textbook case of vagueness and overbreadth. He states:

> Section 42.07 requires that the recipient of the communication be annoyed or alarmed. But the only manner in which the recipient's annoyance can be known is by the recipient's statement to that effect. Every person has his own unique scale of annoyance, and accurate determination of that scale is impossible to judge. Furthermore, the Harassment section is so broad that it includes callers who have every right and reason to intentionally and knowingly annoy or alarm the recipient of the call.

Steele, "The Impact of the New Penal Code on First Amendment Freedoms," 38 *Tex.B.J.* 245, 253 (1975).

This part of the Texas harassment statute proscribes language that is protected as well as language that is not protected by the First and Fourteenth Amendments and Art. I, Sec. 8 of the Texas Constitution. It is not so narrowly drawn to be limited to "fighting words." *Chaplinsky v. New Hampshire,* 315 U.S. 566 (1942). In the words of the Supreme Court in *Cohen,* "one man's vulgarity is another's lyric." 403 U.S. at 25. As long as the means are peaceful, "the communication need not meet standards of accepti-

bility." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Section 42.07(a)(1) proscribes language whether used peacefully or not. It is wholly subjective in that one cannot know what language would annoy or alarm the recipient until the *recipient* speaks. It seeks to regulate speech that is protected by the First and Fourteenth amendments and is, therefore, facially overbroad. See also Annotation, "Validity, Construction, and Application of State Criminal Statutes Forbidding Use of Telephone to Annoy or Harass," by Wayne F. Foster, 95 *A.L.R. 3rd* commencing at page 411.

Thus, for the above and foregoing reasons, the Court should declare the above provisions of Art. 4207, P.C., unconstitutional, null and void.

VIII.

The Complaint and Information, which charged the Petitioner and Applicant with an alleged criminal wrong, is unconstitutional, defective, null and void, in that it is the constitutional right of an accused to be informed of the nature and cause of the accusation against him and he is entitled to a plain statement of the charge against him. No Complaint and Information, omitting key language allegedly used by a defendant, can ever be sufficient to state a criminal offense under the statute. Here, the Petitioner was not told how the communication was done in a "coarse and offensive manner" nor was he told how this act "alarmed" the recipient. Without stating the "how" and the "words" used that would constitute "coarse and offensive manner," the mere tracking of the statute is not sufficient to state a criminal wrong. See *Haecker v. State*, 571 SW2d 920.

Further, this complaint and information is so vague and

lacking in acceptable standards of guilty conduct as to be incapable of giving a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. See *Palmer v. City of Euclid,* 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed. 2d 89 (1971); *United States v. Harris,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); *Cole v. Arkansas,* 68 S.Ct. 514, 333 U.S. 196, 92 L.Ed. 644 (1948); and *Voelkel v. State,* 501 SW2d 313.

Also, Article 21.04, C.C.P., provides that: "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." See also Art. I, Sec. 10, Texas Constitution. The Complaint and Information in this cause is in such form that a valid legal judgment of guilt cannot be based thereon.

The conclusionary statement that the "Defendant did then and there intentionally communicate by telephone in a coarse and offensive manner and by this action intentionally and knowingly alarmed Lisa Fussell, the recipient of said communication," without stating what words were spoken or said and how the communication alarmed the recipient of said communication is so deficient as to fail under both due process as well as due course of law. See also *American Plant Food Corporation v. State,* 508 SW2d 598. It is the intent of Article I, Section 10 of the Texas Constitution and of the Fourteenth Amendment to the United States Constitution that an accused in a particular case be given sufficient information upon which he may prepare his defense and this information must come from the face of the Complaint and Information. See *Terry v.*

State, 471 SW2d 848; *Baker v. State,* 58 SW2d 534; *Voelkel v. State,* 501 SW2d 313. If no offense has been properly alleged, then it will not support a valid conviction and may be attacked collaterally. See *Standley v. State,* 517 SW2d 538.

Thus for the above and foregoing reasons, if no other, the conviction of the Petitioner and Applicant is null and void and should be set aside and held for naught.

PRAYER

WHEREFORE, Petitioner prays that this Honorable Court order the Respondent to show cause why the Writ should not be granted and, after hearing, grant the relief the Petitioner and Applicant seeks by holding the said part of Art. 42.07, P.C., unconstitutional, and further holding the Complaint and Information null and void.

Respectfully submitted,

/s/ Marvin O. Teague
Attorney at Law
914 Main, Suite 1101
Houston, Texas 77002
(713) 222-1728
State Bar No. 19754000

THE STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared PARKER McVICKER, who, being by me duly sworn, upon oath, says that he is the Petitioner in the above and foregoing petition, that he has read said

petition and the factual allegations of same are true and correct.

/s/ Parker McVicker

SUBSCRIBED AND SWORN TO BEFORE ME by the said PARKER McVICKER, this ——— day of ————————, 1980, to certify which witness my hand and seal of office.

/s/ Illegible
Notary Public in and for
Harris County, Texas

My Commission Expires:
3/28/84

CERTIFICATE OF SERVICE

I, MARVIN O. TEAGUE, Attorney for Petitioner, PARKER McVICKER, hereby certify that copies of the above and foregoing Application for State Post-Conviction Writ of Habeas Corpus, have been mailed to the following persons:

Hon. Mark White
Attorney General
Supreme Court Building
Austin, TX 78711

Hon. Joe L. Register
County Attorney
Angelina County, Texas
Lufkin, TX 75901

Hon. Gerald Goodwin
District Attorney
Angelina County, Texas
Courthouse
Lufkin, TX 75901

by placing same in the United States Mail, certified, postage prepaid on this the ——— day of ————————, 1980.

/s/ Marvin O. Teague

EXHIBIT "K"

WRIT NO. 9578

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

EX PARTE PARKER McVICKER

ORIGINAL APPLICATION FOR
WRIT OF HABEAS CORPUS

ORDER

On this day came to be considered this Original Application for Writ of Habeas Corpus presented to this Court by Petitioner. Said Application was not accompanied by a motion for leave to file same; but this Court has considered such Application in the nature of a motion for leave to file and is of the opinion that the motion for leave to file said Application should be denied.

Therefore, it is Ordered, Adjudged, and Decreed that said Application for Writ of Habeas Corpus, considered as a motion for leave to file same, as aforesaid, be, and it is hereby, in all things denied.

It is so ordered this 29th day of September, 1980.

PER CURIAM
En Banc

By: /s/ Sherrie Ericson, Deputy
Ct. of Crim. App. of Texas

EXHIBIT "L"

COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

No. 9578

EX PARTE PARKER McVICKER
ORIGINAL APPLICATION FOR

WRIT OF HABEAS CORPUS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas do hereby certify that on September 22, 1980 an application for writ of habeas corpus was presented to this Court and same was denied by per curiam order dated September 29, 1980.

With the denial of said application this matter became final in this Court.

WITNESS my hand and the seal of said Court, at Austin, Texas, this the 1st day of December, 1980.

/s/ Thomas Lowe, Clerk, Court of
Criminal Appeals of Texas

NO. 80-1164

MAR 26 19
ALEXANDER L. S
CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

PARKER McVICKER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Attorney General of Texas

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First Assistant
Attorney General

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QUESTION PRESENTED

I. Whether Section 42.07(a)(1) of the Texas Penal Code is unconstitutionally vague and overboard.

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NO. 80-1164

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PARKER McVICKER,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

Petitioner correctly states that there is no written opinion of the Texas Court of Criminal Appeals.

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's attack on Section 42.07(a)(1) of the Texas Penal Code is based on the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case.

SUMMARY OF ARGUMENT

Section 42.07(a)(1) of the Texas Penal Code is not unconstitutionally vague or overbroad. When the statutory terms are considered in light of the *scienter* requirement, persons of ordinary intelligence are given fair notice of the conduct which is forbidden. The State has a valid interest in proscribing obscene, threatening, and harassing telephone calls, and no First Amendment rights are implicated thereby. Even if engaging in such vexatious conduct may be said to constitute protected expression, the right to do so must yield to the privacy rights of the recipients of intentionally annoying communications.

ARGUMENT

SECTION 42.07(a)(1) OF THE TEXAS PENAL CODE IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBOARD.

A. Section 42.07(a)(1) gives persons of ordinary intelligence fair notice of the conduct which it forbids.

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *United States v. Harriss*, 397 U.S. 612, 617 (1954), or if it encourages arbitrary arrests and convictions. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The constitutional prohibition against vagueness does not, however, invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Rose v. Locke*, 423 U.S. 48, 49 (1975). "Condemned to the use of words, we can never expect mathematical precision from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). *See Rose v. Locke*, 423 U.S. at 50; *Roth v. United States*, 354 U.S. 476, 491-92 (1957). Whether the language conveys sufficiently definite warning must be determined by measuring it against "common understanding and practices," *Jordan v. De George*, 341 U.S. 223, 231 (1954), and the question whether a state statute is vague must be answered in light of prior state court constructions of the statute. *Wainwright v. Stone*, 414 U.S. 21, 22 (1973).

Appellant's claims of vagueness relate to the statute's use of the words "coarse," "offensive," "annoy," and "alarm." The Texas Court of Criminal Appeals has held, in a decision which this Court declined to review, that the words "annoy" and "alarm" are not unconstitutionally vague. *Collection Consultants, Inc. v. State*, 556 S.W.2d 787 (Tex.Crim.App. 1977), *appeal dismissed*,

436 U.S. 901, *rehearing denied*, 438 U.S. 908 (1978). In *Kramer v. State*, 605 S.W.2d 861 (Tex.Crim.App. 1979), the Court of Criminal Appeals addressed the identical contention made by Petitioner in the instant cause. The court held that the words "annoy" and "alarm" are not impermissibly vague, citing *Collections Consultants, Inc.*,[1] and also held that the words "coarse" and "offensive" pass constitutional muster, reasoning as follows:

> Appellant argues that if we allow the statute to stand then any recipient of a message may decide what that recipient thinks is "coarse and offensive", and that the person of ordinary intelligence is therefore without a guide to the conduct forbidden by Section 42.07. But the gravamen of the violation of Section 42.07(a) as charged in the information is the intent to annoy and alarm by means of a "coarse and offensive" message. . . . There is no room in the statute for a vindictive or overly sensitive recipient to create an offense by his own belief in the coarseness of offensiveness of a message.

605 S.W.2d at 866. Similarly, this Court, in rejecting a vagueness attack on an anti-noise ordinance, found relevant the *scienter* requirement contained therein. *Grayned v. City of Rockford*, 408 U.S. at 113-14. In *Karp v. Collins*, 310 F.Supp. 627 (D.N.J. 1970), *vacated on other grounds sub nom. Kugler v. Karp*, 401 U.S. 930, *on remand*, 333 F.Supp. 15 (1971), a New Jersey statute which proscribed the use of "loud and offensive" language in public (N.J. Stat.Ann. 2A: 170-29) was upheld from constitutional attack because the word "offensive" was construed to require an intentional disturbance of others. And in *People v. Smith*, 392 N.Y.S.2d

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[1]Petitioner's contention that the Court of Criminal Appeals misconstrued its prior decisions in so holding does not present a question worthy of this Court's consideration.

968 (N.Y.S.Ct.), *cert. denied*, 434 U.S. 920 (1977), a New York statute which prohibited communicating by telephone "with intent to harass, annoy, threaten or alarm another person" and "in a manner likely to cause annoyance or alarm" (N.Y. Cons. Laws, Book 39 §240:30) was declared constitutional.

Unlike the ordinances held invalid in *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Coates v. Cincinnati*, 402 U.S. 611 (1971), Section 42.07(a)(1) does not permit punishment merely for the expression of an unpopular view, nor does it contain a broad invitation to subjective enforcement. Absent an intent on the part of the caller to annoy or alarm the recipient, a "coarse and offensive" telephone call does not constitute an offense under the statute. When the statutory terms are "read in context and construed according to the rules of grammar usage," Tex. Rev. Civ. Stat. Ann. art. 5429b-2 §2.01; Tex. Penal Code Ann. §1.05(b), they do not fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden thereby.[2]

B. *Section 47.02(a)(1) is applicable only to vexatious conduct which is violative of the privacy rights of others, and the statute does not infringe upon any constitutionally protected expression.*

Petitioner concedes, as he must, that the State has a legitimate interest in prohibiting obscene, threatening, and harassing telephone calls, none of which is generally thought of as protected by the First Amendment. Even when the right to communicate is involved, it must be

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[2] "There are areas of human conduct where, by the natue of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Gougen*, 415 U.S. 566, 581 (1974).

balanced with "the right of every person 'to be let alone,'" *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978), and the private property rights of others. *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 568 (1972). *See also, Cohen v. California*, 403 U.S. 15, 21-22 (1971).

> Nothing in the Constitution compels us to listen to or view any unwanted communication whatever its merit. . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. United States Post Office Department, 397 U.S. at 737.

> The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. §1692d (1976 ed., Supp. II).

F.C.C. v. Pacifica Foundation, 438 U.S. at 749 n.27.

It is precisely the kind of privacy rights involved in *Rowan* and *Pacifica Foundation* that Section 42.07(a)(1)

was designed to protect. Correctly recognizing that language which is not obscene may be unduly offensive to the listener, *see Kramer v. State*, 605 S.W.2d at 866, the legislature also chose to proscribe "coarse and offensive" communication which is intentionally annoying or alarming. The statute is by its terms inapplicable to public utterances and therefore may not be said to exert a "chilling effect" on constitutionally protected expression. Petitioner's reliance on *Walker v. Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975) and *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd*, 596 F.2d 1205 (4th Cir. 1979) is misplaced. The overly broad statutes which were struck down in those decisions were not limited to deliberate intrusions upon the privacy of others.

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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